IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE

**FIRST APPEAL NO.1186 OF 1988**

Madhu Malhotra
flat 13, 3rd floor, Nirmal Building
15th Road, Khar, Bombay - 52 ... Appellant

V/s.

1. Iqbal Akhtar wd./o.
Mohd. Anwar s/o. Mohd. Shafi

2. Salima Banoo d/o. Mohd. Anwar

3. Mohd. Yusuf s/o. Mohd. Anwar
all heirs and L.R.s
of Mohd. Anwar s/o. Mohd. Shafi
all residing at Picnic Lodge
Jassawalla Bungalow, Juhu Road
Bombay - 54

4. Mehrunnissa D/o. Laxman

5. Miss Parveen @ Guddu ... Respondents

Ms.S.S. Bhole i/b R.L. Patil for Appellant
None for Respondents

CORAM: **SMT.NISHITA MHATRE, J.**

JUDGMENT RESERVED ON: **OCTOBER 8, 2004**
JUDGMENT PRONOUNCED ON: **NOVEMBER 5, 2004**

**JUDGMENT:**

. This First Appeal is directed against the judgment of the trial Court in a Chamber Summons taken out by the appellant-plaintiff No.2 for a direction to the Court Receiver appointed in the Suit to remove the obstruction of Respondent Nos.1 and 2 and for taking possession of the assets of the suit partnership for executing the order dated 19th July 1985, with or

without the aid of the Police.

2. In 1968, one Kulsumbi, the original plaintiff No.1 and her daughter Tanveer, original plaintiff No.2 and the appellant in the present appeal instituted a suit against one Mohammed Anwar, the original defendant. It was the case of the plaintiffs that they were the heirs of one Gulam Hussein Bhatti, plaintiff No.1 being his wife and plaintiff No.2 being their daughter, who was a partner in the business known as Picnic Lodge. The partnership firm consisted of Gulam Hussein Bhatti who died on 7.1.1966 and Mohammed Anwar. After the death of Gulam Hussein Bhatti, the partnership was dissolved and the plaintiffs filed a suit for accounts of the partnership concern. This suit was numbered as S.C. Suit No.2592 of 1968. During the pendency of the suit the original defendant died and therefore Defendant Nos.1, 2 and 3 were brought on record as his heirs and legal representatives. The suit was decreed. The trial Court found that the original plaintiff No.1, that is, Kulsumbi was the wife of Gulam Hussein Bhatti and the original plaintiff No.2 was their daughter. The Court decreed that the plaintiffs and the defendants were each entitled to 1.1/2 share of the suit partnership. Defendant Nos.1 to 3 were ordered to render accounts of the partnership and certain other consequential orders were passed on 30.4.1985. Being dissatisfied with the

judgment and order, First Appeal No.289 of 1985 was preferred by the defendants. The First Appeal was dismissed and the Letters Patent Appeal preferred also came to be dismissed. The learned Single Judge of this Court in the First Appeal as well as the Division Bench in the Letters Patent Appeal confirmed the finding of fact of the trial Court that the plaintiffs were the heirs of Gulam Hussein Bhatti. The Division Bench, while confirming the findings of fact of the trial Court and dismissing the Letters Patent Appeal, substituted the order of the trial Court as it contained some infirmities. Decree was to be drawn up accordingly.

3. Before the trial Court, one Mehrunnissa claiming to be the wife of Gulam Hussein Bhatti filed an affidavit on behalf of the defendants avering that she was one of the partners in the suit business and that she had been admitted into the partnership after the death of Gulam Hussein Bhatti. While passing the decree, the trial Court held that Mehrunnissa was not the wife of Gulam Hussein Bhatti.

4. Thereafter, Chamber Summons No.1114 of 1985 was moved by the plaintiffs under Order 21 Rule 97 of the Code of Civil Procedure. This was because despite the decree, they were not able to execute the same as it was being obstructed by one Mehrunnissa and her daughter

Respondent Nos.1 and 2 herein, who claimed no independent right in the suit partnership but as heirs of Gulam Hussein Bhatti. The Chamber Summons filed by the plaintiffs was dismissed by the trial Court. Several issues were framed by the trial Court. The trial Court was of the view that despite the decree in suit No.2592 of 1968 wherein it was found that the plaintiffs were the wife and daughter of Gulam Hussein Bhatti it was not binding on the parties to the Chamber Summons. The trial Court found that Respondent No.1 was the widow of Gulam Hussein Bhatti and Respondent No.2 was their daughter. The trial Court was of the view that Respondent No.1 had become a partner of the firm Picnic Lodge after the death of Gulam Hussein Bhatti.

5. The question, therefore in the present Appeal, is whether the trial Court while deciding the Chamber Summons could have arrived at the conclusion it has regarding the status of the plaintiffs qua the deceased Gulam Hussein Bhatti. It will also have to be considered whether the trial Court was right in coming to the conclusion that Mehrunnissa was the wife of Gulam Hussein Bhatti when the trial Court in Suit No.2592 of 1968 by judgment dated 30.4.1985 had concluded the issue and held that plaintiff Nos.1 and 2 were the wife and daughter respectively of the deceased Gulam Hussein Bhatti. The trial Court had also come to the conclusion

that Mehrunnissa was not married to Gulam Hussein Bhatti and therefore, the suit was not bad for non-joinder of Mehrunnissa. When these findings of fact had already been confirmed by this Court in First Appeal No.289 of 1985 and in Letters Patent Appeal No.61 of 1985, could the trial Court have re-opened this issue in execution proceedings ?

6. The submission of the learned Advocate appearing for the appellant is that the findings of the trial Court in Suit No.2592 of 1968 that the plaintiffs were the wife and daughter of the deceased Gulam Hussein Bhatti are binding and constitute *res judicata* in the Chamber Summons. The learned Advocate Ms.Bhole submits that the findings in the suit that Mehrunnissa, Respondent No.1 and Respondent No.2 was not the widow and daughter respectively of Gulam Hussein Bhatti act as res judicata and, therefore, the trial Court, in the Chamber Summons taken out in the execution proceedings, could not have arrived at a different conclusion. She submits that the respondents were not claiming any independent right in the partnership but were claiming as heirs of Gulam Hussein Bhatti. When there was already a finding against them that they were not the legal heirs of Gulam Hussein Bhatti, the Chamber Summons ought to have been allowed. She further submits that the obstructionists had obviously become a stumbling

block in the execution proceedings at the behest of the defendants who even when the suit was heard had procured an affidavit from Mehrunnissa in which she averred that she was the wife of Gulam Hussein Bhatti and that Parveen was her daughter. The learned Advocate relies on the judgments of the Supreme Court in *Wali Mohammed & Ors. v/s. Smt.Rahmat bee & Ors.,* **AIR 1999 SC 1136** and *K. Ethirajan & Ors. v/s. Lakshmi & Ors.*, **(2003) 10 SCC 578**.

7. The submissions made by Ms.Bhole must be accepted. The finding of the trial Court in the suit is unambiguous and Kulsumbi and her daughter are declared to be the heirs of Gulam Hussein Bhatti. This finding has been confirmed by this Court in the First Appeal and in the Letters Patent Appeal. Four out of the many issues which were specifically framed in the suit are answered thus:

> (2) Whether the first plaintiff is the widow of the deceased Gulam Hussain Bhatti, as alleged in para 2 of the Plaint? Yes.
>
> (3) Whether the second Plaintiff Tanveer is the daughter of the deceased Gulam Hussain Bhatti, as alleged in para 2 of the plaint? Yes.
>
> (4) Whether Mehrunissa was married to and/or is the only widow of Gulam Hussain Bhatti, as alleged in para 2 of the plaint? No.
>
> (5) Whether the suit is bad for non-joinder of Mehrunnisa is, therefore, liable to be dismissed as alleged in para 3 of the written statement? No.

8. On the basis of evidence led before it, the trial Court has held that Gulam Hussein Bhatti was wedded to Kulsumbi and that Tanveer was their daughter. While considering Issue Nos.4 and 5, the trial Court has also taken into account the question as to whether the suit was bad for non-joinder of Mehrunnissa as a party to the suit. The trial Court has disbelieved the evidence of the plaintiffs and has held that although Mehrunnissa's evidence was very material, the defendants had not cared to examine her. The trial Court has therefore drawn an adverse inference. In fact, an application was made by the plaintiffs on 17.4.1985 that Mehrunnissa be called to depose in the matter. However, since the defendants did not bother to examine her, the trial Court has drawn adverse inference against the defendants. The trial Court held that the marriage registration certificate purporting to be the marriage certificate of one Mehrunnissa and Gulam Hussein Bhatti could not be relied on. The trial Court, therefore, was of the view that the defendants have failed to discharge the burden of proving that Mehrunnissa was the legally wedded wife of Gulam Hussein Bhatti. In view of this finding, the trial Court also held that she was not a necessary party.

9. These findings have been confirmed by this

Court. Despite this, the trial Court while deciding the Chamber Summons has framed the same issues all over again and has held that the Mehrunnissa was the wife of Gulam Hussein Bhatti and Parveen was their daughter.

10. When a question arises as to whether the doctrine of res judicata comes into play, it must be borne in mind that if an issue is raised and decided, not merely as an incidental question, it must be binding on the parties. If the issue arises only incidentally it would not fall within the periphery of the Principal of res judicata. One of the tests to determine whether the doctrine of res judicata applies is to determine whether two inconsistent decrees would come into existence if it is not so applied as held in *Narayana Prabhu Venkateswara Prabhu v/s. Narayana Prabhu Krishna Prabhu,* **AIR 1977 SC 1268**. The doctrine of res judicata has a salutory effect on the larger public interest which requires that all litigation sooner than later comes to an end. A party which once succeeds on a particular issue, should not be permitted to be harassed by multiplicity of proceedings for determining the same issue. The findings recorded by the trial Court in the Chamber Summons were clearly barred by res judicata in view of the findings in the suit.

11. There is no doubt that neither Mehrunnissa nor

her daughter claimed any independent right in the partnership. They claimed a right only as heirs of Gulam Hussein Bhatti. Mehrunnissa in fact was aware of the suit filed by the plaintiffs and she had tendered an affidavit claiming to be the wife of the deceased Gulam Hussein Bhatti. However, she did not care to either get herself impleaded in the suit nor was she called as a witness to depose in the suit. The findings of the trial Court would therefore, bind her as she does not claim any independent right but only as an heir of Gulam Hussein Bhatti. The decision of the Apex Court in the case of *K. Ethirajan & Ors.* (supra) elucidates the principle of res judicata and hence, applicable. The principle of res judicata under section 11 of the Code of Civil Procedure is attracted where some issues are directly and substantially involved.

12. The present Chamber Summons was only an off-shoot of the decision in the suit. The trial Court, therefore, ought not to have come to the conclusion that it has, regarding the marital status of plaintiff No.1 and Mehrunnissa when this status had already been decided in the suit. There was no need for the trial Court to consider this issue while deciding the Chamber Summons filed under Order 21 Rule 97 of C.P.C.

13. In this view of the matter, the impugned

judgment and order is set aside. First Appeal is allowed with costs.

. Certified copy of the order expedited.